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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

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CONTINENTAL/AIR MICRONESIA AND CONTINENTAL AIRLINES, INC.,

*Petitioners,*

v.

NATIONAL MEDIATION BOARD,

*Respondent.*

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTION PRESENTED

Are National Mediation Board interpretations of the Railway Labor Act which disregard the statute's language and majority rule principle insulated from judicial review by *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943)?

## PARTIES

The petitioners are Continental Airlines, Inc. and Continental/Air Micronesia. The United Micronesia Development Association, a corporation incorporated in the commonwealth of the Northern Mariana Islands, owns 100% of the stock of Air Micronesia, Inc. Continental Airlines Holdings, Inc. owns 100% of the stock of Continental Airlines, Inc.

Respondent National Mediation Board is an independent agency in the executive branch of the United States government, charged with investigating and conducting employee representation elections of rail and air carriers under the Railway Labor Act, mediating disputes about formation of agreements, and facilitating arbitration of disputes about interpretation of contracts.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners Continental/Air Micronesia and Continental Airlines, Inc. (hereafter "Air Micronesia" and "Continental" respectively) request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 17, 1992.

## OPINIONS BELOW

The judgment of the court of appeals is reproduced at Pet. App., at 1a. Although there is no written opinion, the memorandum order affirming the district court is reported at

957 F.2d 911. The opinion and order of the district court (Pet. App., at 4a) are not reported. The order of the National Mediation Board (Pet. App., at 15a) is reported at 18 N.M.B. 40.

## JURISDICTION

The judgment of the court of appeals was entered on March 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

45 U.S.C. § 152, Fourth:

> Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter.

45 U.S.C. § 152, Ninth:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the

employees involved in the dispute, and certify the same to the carrier. . . . In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

## STATEMENT OF THE CASE

This case involves whether judicial review is available to ensure that the National Mediation Board ("NMB" or "Board") fulfills one of its two primary statutory duties: safeguarding employee rights to determine their bargaining representatives.[1] The courts below, relying upon decisions applying the Court's decision in *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), insulated from judicial review an NMB decision that disregarded both the statute's language and its vital majority rule principle.

The Union of Flight Attendants ("UFA"), a small, local union, represented only Continental Airlines and Air Micronesia flight attendants under two separate NMB certifications obtained pursuant to NMB elections conducted in 1982 and 1983. In the fall of 1983, Continental entered bankruptcy and UFA instituted an unsuccessful strike against Continental. During the strike, in February 1984, UFA entered into a "Merger Agreement" which provided that UFA would be absorbed into the International Association of Machinists and Aerospace Workers of America, AFL-CIO ("IAM"). Under the Merger Agreement, UFA ceded all independence to IAM in exchange for IAM's promises of financial assistance to the UFA: a $30,000 per month allowance; the payment of salaries for UFA's employees and business representatives; and IAM's assumption of all UFA's litigation and bankruptcy fees and expenses. IAM is a major international union which represents hundreds of thousands of employees in many industries under a constitution and hierarchial structure significantly different from that of UFA.

During March 1984, UFA conducted a "merger agreement election" by mail ballot; neither the NMB nor any independent authority designated by the NMB ever verified

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1 The other duty, mediation of "major" disputes between carriers and unions, is not involved in this case.

the accuracy of the list of eligible voters, their mailing addresses, or the integrity of the balloting process. Only 47.6% (1,238 of 2,615) of the employees who were sent ballots returned them and only 41.1% (1,077) of the flight attendants polled voted in favor of the merger. UFA mailed ballots to only 33 of the 59 flight attendants then employed by Air Micronesia (which had been certified as a separate bargaining unit by the NMB). No separate records were maintained concerning whether any Air Micronesia flight attendants voted and, if so, whether they voted for or against the proposed merger.

Five and one-half years after the "merger agreement election,"[2] on September 13, 1989, the UFA and IAM requested that the NMB transfer to the IAM the two certifications for UFA to represent the Continental and Air Micronesia flight attendants. This request was granted on October 31, 1990. Pet. App., at 15a. The Board made no effort to determine independently the wishes of affected employees, but merely accepted the representations of the interested unions as to employee wishes. By the date of NMB approval of the transfer request, Continental's workforce had approximately 6,300 affected employees, only 1,000 of whom were employed at the time of the union election in 1984.

The courts below upheld the Board's decision on the ground that judicial review in RLA cases was precluded by precedents based on the Court's decision in *Switchmen's Union*. Judge Charles R. Richey, for the District Court for the District of Columbia, found that "None of the alleged violations advanced by the plaintiffs rise to a 'constitutional dimension or gross violation of the [RLA]'" and concluded that "the Court lacks the power to grant the plaintiffs relief." Pet. App., at 12a. The Court of Appeals for the District of

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2 According to the IAM, this delay was caused by internal union policies, not by Continental or Air Micronesia. During the interim period, it was the UFA, not the IAM, that acted as the collective bargaining representative of the flight attendants.

Columbia (Judges Wald, Sentelle and Henderson) summarily affirmed the District Court, noting that "court review of NMB decisions is 'one of the narrowest known to the law'" and that a "peek at the merits" revealed no "gross violation of the statute" by the NMB. Pet. App., at 2a.

## REASONS FOR GRANTING THE WRIT

The courts below erroneously precluded judicial review of NMB certification of the IAM when, so far as anyone knows, *none* of Air Micronesia's and only a very small fraction of Continental's employees ever expressed any desire to be represented by that union. Judicial review is necessary to prevent the Board from ignoring the statutory language and disregarding the central premise of the statute it is charged with enforcing: that it may certify a union to represent employees *only* if it ensures that a majority of the employees involved support that representation. The Board itself was clear as to the implications of the present situation where judicial review is, for all practical purposes, impossible. It claimed not only the "unfettered discretion to determine how to ascertain employee preference" but also "the power to determine *whether* to ascertain employee wishes at all." Defendant's Reply To Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment, at 11 (emphasis added).

### I. THE COURT'S DECISIONS HAVE BEEN MISAPPLIED TO PRECLUDE JUDICIAL REVIEW OF NMB INTERPRETATIONS OF THE RLA

The Court has not yet examined whether Board practices which deny employees an opportunity to select representatives of their choice are subject to judicial review. Moreover, the decision of the Court upon which the courts below ultimately premised preclusion of review does not stand for that proposition. *Switchmen's Union* involved a jurisdictional dispute between two unions competing to

represent certain "yardmen" employed by two railroad companies. When the NMB decided that "all yardmen in the service of a carrier should select a single representative for collective bargaining" rather than being divided into subgroups of yardmen to bargain separately, the Court held that the district court "did not have the power to review the action of the National Mediation Board." *Id.* at 299-300. The holding in *Switchmen's Union* merely prevents judicial second-guessing of Board decisions to place employees in one bargaining unit or another.[3]

Justice Douglas' language for the 4-3 majority swept more broadly, however. Indeed, contrary to modern administrative law concepts, Justice Douglas denied that the federal judiciary should have "the final say on any aspect of the problem" of disputes in the transportation industry. *Id.* at 303.[4]

Ironically, two companion cases to *Switchmen's Union* demonstrated the Court's awareness that claims that the NMB ignored employee desires in representation cases contrary to RLA policy should be subject to judicial review.

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3 The *Switchmen's Union* Court itself, saying that such a situation is "not now before us," implied that judicial review would have been available to a *carrier* contesting an improper certification. 320 U.S. at 307.

4 Justice Reed's dissent focused upon the reasons for judicial review of agency interpretations of law:

> Where duties are delegated, as here, to administrative officers, those administrative officers are authorized to act only in accordance with the statutory standards enacted for their guidance. Otherwise we should risk administrative action beyond or contrary to the legislative will.

*Switchmen's Union*, 320 U.S. at 312. Obviously concerned at the broad reach of Justice Douglas' language, Justice Reed expressed his fear that "the court authorizes the Mediation Board to determine not only questions judicially found to be committed to its discretion . . . but the statutory limits of its own powers as well." *Id.* at 321.

*General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 334 (1943) (no jurisdiction to review NMB decision involving a jurisdictional dispute but "[T]he principle of majority representation is not challenged [here]."); *General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338, 344 (1943) ("Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts . . . [W]hether different considerations would be applicable in case an employee were asserting that the Act gave him the privilege of choosing his own representative for the prosecution of his claims is not before us.").[5]

This case poses those "different considerations" left open in the 1943 RLA trilogy, for the courts below improperly precluded review of a Board decision which, among other things, (1) disenfranchised more than 80% of the current employees of Petitioners on the question of representation by the IAM, (2) certified the IAM with no showing that more than 50% of Petitioner Continental's employees *ever* desired such representation and (3) permitted the IAM to represent Petitioner Air Micronesia's employees with no showing that *any* of them desired such representation.

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5 Limiting *Switchmen's Union* as we urge would avoid constitutional questions. Professor Henry Hart, in his seminal "Dialog" dealing with the constitutional underpinnings of the right to judicial review, implied the *Switchmen's Union* restrictions on judicial review might be constitutionally permissible *only* because *Switchmen's Union* was a jurisdictional case in which two unions sought exclusive bargaining rights. Unlike the carrier whose contract and property rights are limited by this statutory scheme, the unions in a jurisdictional dispute lose nothing apart from what they could acquire under Section 2, Ninth. Hart & Wechsler's Federal Courts and the Federal System, 345-46 (2d ed. 1976). *See also* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 916, 976-982 (1988) (criticizing *Switchmen's Union* on Article III grounds for locating judicial power in executive hands).

Unfortunately, this is not an isolated instance of a lower court's misuse of *Switchmen's Union*.[6] The Court's guidance is necessary because *Switchmen's Union* has been expansively applied by the lower courts to preclude judicial review in a wide range of RLA cases, effectively insulating from meaningful judicial review all NMB decisions of whatever character.[7] Indeed, while lower courts have often criticized the NMB,[8] the Courts of Appeals have overturned

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6 Another certiorari petition is currently pending before the Court concerning the reach of *Switchmen's Union*. *Virgin Atlantic Airways, Ltd. v. National Mediation Board*, No. 91-1873 (Filed May 19, 1992).

7 *See, e.g., Virgin Atlantic Airways, Ltd. v. IBT*, 956 F.2d 1245 (2d Cir. 1992) (NMB includes as eligible voters individuals having no employment relationship with carrier); *USAir, Inc. v. NMB*, 894 F.2d 403 (4th Cir. 1989) (NMB refuses to investigate carrier's allegations of union election interference); *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989) (NMB counts unreinstated strikers as eligible voters); *IAM v. Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988) (NMB denies statutory duty of neutrality); *Yardmasters v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983) (NMB operates with only one member, despite statutory requirement of two member quorum); *British Airways Bd. v. NMB*, 685 F.2d 52 (2d Cir. 1982) (NMB cut-off date two years before election; no counting of mislaid ballots); *Air Canada v. NMB*, 478 F. Supp. 615 (S.D.N.Y. 1979); *Aeronautical Radio, Inc. v. NMB*, 380 F.2d 624, 626-27 (D.C. Cir.), *cert. denied*, 389 U.S. 912 (1967) (NMB defines meaning of "majority"); *Teamsters v. NMB*, 363 F.2d 311 (D.C. Cir.), *cert. denied*, 385 U.S. 929 (1966) (NMB concludes unions have no constitutional right to campaign); *WES Chapter, FEIA v. NMB*, 314 F.2d 234, 236-37 (D.C. Cir. 1962) (NMB determines eligibility of strikers to vote); *UNA Chapter, FEIA v. NMB*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962) (NMB investigating committee proceeds on *ex parte* basis).

8 *IAM v. Trans World Airlines, Inc.*, 839 F.2d 809, 812 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988) ("treatment of these employees certainly does not cast the NMB in a very favorable light"); *Sedalia-Marshall-Boonville Stage Line, Inc. v. NMB*, 574 F.2d 394, 396 n.3, 399 n.5 (8th Cir.), *cert. denied*, 439 U.S. 881 (1978) ("NMB's authority and procedures are out of tune with the realities of modern day labor-management relationship and current due process concepts . . . . It is unfortunate that the statutes, and cases interpreting them, permit such unilateral and arbitrary imposition of a union upon a carrier without a hearing of any sort."); *Teamsters v. BRAC*, 402 F.2d 196, 204 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968) ("[C]ourts must put aside the kinds of disquietude that we have sketched in deference to the doctrine of *Switchmen's Union* . . ."); *BRAC v. NMB*,

(continued . . .)

NMB decisions only twice in the 49 years since *Switchmen's Union* was decided.[9] Not surprisingly, as discussed herein at pp. 14-16, this lack of review has led the NMB to disregard the desires of a majority of affected employees, to ignore the language and policy of the RLA and, without explanation, to abandon its own prior decisions.

Such broad readings of *Switchmen's Union* conflict with *Brotherhood of Ry. & S.S. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) (*"Railway Clerks"*). In *Railway Clerks*, the Court permitted review to see if the Board performed its statutory duty to "investigate" a dispute. The extent to which the Board totally ignored statutory duties and employee desires in this case goes far beyond the Board transgressions of the Railway Labor Act alleged in *Railway Clerks*. Here the Board failed to perform any investigation concerning the wishes of current employees or into the *bona fides* of the alleged election. *See infra* at pp. 14-15, n. 17. Indeed, the Board had absolutely no involvement in the 1984 "merger agreement election" conducted by an interested union, despite the fact that it had the statutory duty to either conduct the election itself or appoint a committee of neutrals to do so.[10]

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8 (...continued)
374 F.2d 269, 275 (D.C. Cir. 1966) ("Board's letter was unfortunate and even vexing . . ." in that Board did not make sufficient effort to wipe out union fraud, but still not sufficient "predicate for the court's exceptional jurisdiction . . .").

9 *International In-Flight Catering Co. v. NMB*, 555 F.2d 712 (9th Cir. 1977) (NMB certified union based on cards, where employees only authorized an election); *Russell v. NMB*, 714 F.2d 1332, 1341 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) (NMB "breached its clear statutory mandate" when it refused to process application for election). Now on appeal to the Ninth Circuit is a third case, *America West Airlines, Inc. v. NMB*, 743 F. Supp. 693 (D. Ariz. 1990) (NMB improperly notified employees that the carrier violated the Act).

10 *See also Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 441 (1989) (*"TWA"*), ("judicial intervention in RLA procedures [is] limited to those cases where 'but for the general jurisdiction of the (continued...)

Such an expansive interpretation of *Switchmen's Union* is also inconsistent with two subsequent Congressional enactments which presume judicial review: the Administrative Procedure Act ("APA") of 1946 (5 U.S.C. § 551 et. seq.) and the 1976 amendments to 28 U.S.C. § 1331. The APA provides that "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion--(a) * * * Any person suffering a legal wrong because of any agency action * * * is entitled to judicial review thereof." 5 U.S.C. § 702. Both the Senate and House Reports on the APA unmistakably reaffirm the strong presumption of judicial review: "Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial." S. Doc. No. 248, 79th Cong., 2d Sess. 368 (1946); "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially for judicial review is certainly no evidence of intent to withhold review." H.R. Rep. No. 1980, 79th Cong. 2d Sess. 275 (1946).[11]

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10 (...continued)
federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act.'"). The courts below limited this exception to "gross violations" of the statute, presumably permitting the Board to misconstrue the RLA or commit "ordinary" violations of the statute.

11 *Railway Clerks* and *TWA, supra,* provide no guidance on the relevance of the APA to judicial review of Board interpretations of the RLA, for neither references the APA. Two panels of the Court of Appeals for the District of Columbia have reached divergent conclusions as to this issue. Compare *Kirkland v. Atlantic Coast Line R.R.*, 167 F.2d 529, 530 (D.C. Cir.), *cert. denied*, 335 U.S. 843 (1948), (RLA "gives clear and convincing evidence of intent to withhold judicial review") with *Air Line Dispatchers Ass'n v. National Mediation Board*, 189 F.2d 685, 689 (D.C. Cir.), *cert. denied*, 342 U.S. 849 (1951) ("since there is no explicitness in the Railway Labor Act or indication in its history of a Congressional intention to leave it exclusively to Board determination," APA commands judicial review).

A central purpose of the second statute, Pub. L. No. 94-574 (amending 28 U.S.C. § 1331 to eliminate the minimum amount in controversy requirement), was to fill "an unfortunate gap in the statutory jurisdiction of the Federal courts." H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 14 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6135. Though the amendment did not affect such limitations on judicial review as lack of standing,[12] Congress was concerned that litigants challenging agency action not face "a denial of any [judicial] remedy whatsoever." *Id.* at 15. As the Court said in *Califano v. Sanders*, 430 U.S. 99, 105 (1977), "The obvious effect of this modification [to 1331], subject only to preclusion-of-review statutes created or retained by Congress, is to confer jurisdiction on federal courts to review agency action, regardless of whether the APA of its own force may serve as a jurisdictional predicate."

Indeed, the decision below is so irreconcilable with the Court's presumption of judicial review that, if *Switchmen's Union* is not limited as argued herein, it should be overruled.[13] *See, e.g., Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) ("judicial review of a final agency action by an aggrieved person will not be cut off unless there is

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12 Any question as to the carrier's interest in, and standing to challenge, the NMB's certification of a union was resolved in *Railway Clerks, supra*, when this Court granted certiorari on the question of the carrier's standing and entertained merits claims of the carrier. *Accord British Airways Bd.*, 685 F.2d at 54-55. *International In-Flight Catering Co. v. NMB*, 555 F.2d 712, 719 (9th Cir. 1977) (carrier standing to challenge "unlawfully and allegedly improperly certified bargaining representative.").

13 *Switchmen's Union* was first extensively criticized in Louis L. Jaffe, *The Right to Judicial Review I*, 71 Harv. L. Rev. 401 (1958). Professor Jaffe noted that "The starting point of Mr. Justice Douglas' opinion is significant. Both in its attitude and in the result to which it leads, it contradicts or ignores what I have called the presumption of reviewability." *Id.* at 429. Because the case is so at odds with this presumption, he observed, it has "borne little fruit," *Id.* at 430, in other areas of the law. As demonstrated in this petition, however, it has had a profound effect in undermining the rights of employees to select their representatives under the RLA.

persuasive reason to believe that such was the purpose of Congress"); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of administrative action").[14]

Finally, limiting *Switchmen's Union* to disputes not involving Board disregard for the RLA's fundamental majority rule principle would have the salutary effect of submitting NMB interpretations of the RLA to the same level of judicial review as National Labor Relations Board ("NLRB") interpretations of the National Labor Relations Act ("NLRA").[15] Judicial review of the NMB is even more needed to protect employee free choice in light of (1) the RLA provision which permits a mandatory union shop, 45 U.S.C. § 152, Eleventh; (2) the absence of a statutory mechanism to permit decertification of a union once certified, *see Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); and (3) the Board's stated view that the RLA does not require that the Board remain "neutral" in representation cases. *See IAM v. Trans World Airlines, Inc.*, 839 F.2d 809 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988).

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14 Recent academic commentary strongly supports the Court's presumption of review. *See, e.g.*, Cass R. Sunnstein, *Interpreting Statutes*, 103 Harv. L. Rev. 407, 475 (1989) ("[C]ourts presume that the Legislature has not precluded judicial review of agency decisions. This presumption is partly attributable to a belief–vindicated by recent experience–that regulatory agencies are susceptible to factionalism and self-interested representation. Judicial review operates as both an ex ante deterrent against dangers of this sort and an ex post corrective. If Congress is to eliminate judicial review, it must do so unambiguously.").

15 When the NLRB designates an appropriate unit, broad discretion is given to such determinations. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) (NLRB has broad discretion to determine the appropriate bargaining unit). Conversely, NLRB interpretations of the NLRA are subjected to traditional standards of judicial review.

## II. LACK OF JUDICIAL REVIEW HAS PERMITTED THE NMB TO DISREGARD THE RLA'S LANGUAGE AND MAJORITY-RULE PRINCIPLE

"Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the [RLA] statutory scheme." *General Committee of Adjustment v. Missouri-K-T R.R.*, 320 U.S. 323, 329-30 (1943), *quoting Texas, N.O. R.R. v. BRAC*, 281 U.S. 548, 567 (1930). Congress explicitly provided in Section 2, Fourth of the RLA, 45 U.S.C. § 152, Fourth, that "Employees shall have the right to organize and bargain collectively *through representatives of their own choosing.*" (emphasis added). As this Court noted in *Switchmen's Union*, employee freedom of choice is protected by Section 2, Ninth, which provides that the NMB may use any "appropriate means" to determine employee wishes on representation issues, but that *"In the conduct of any election . . . the Board shall designate* who may participate in the election and establish the rules to govern the election or may appoint a committee of three neutral persons . . . ." 45 U.S.C. § 152, Ninth (emphasis added).[16] Without examining the wishes of any employees, conducting any election, establishing any rules to govern the election or appointing any committee of neutrals, the Board relied upon an outdated election conducted

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16 Legislative history confirms that Congress intended a neutral agency, not interested parties, to oversee the selection of representatives. *See* Hearings on H.R. 7650 Before the Interstate and Foreign Commerce Committee, 73d Cong., 2d Sess. 40 (1934): "the only way in which you can cover that matter adequately is to give a neutral and impartial and independent board the right to determine those matters. . . you have got to delegate that duty to an impartial neutral independent organization representing the Government." (Commissioner Eastman, principal draftsperson of the RLA).

by the interested parties and certified the IAM to represent Petitioners' employees.[17]

The Board has consistently agreed that the present matter is a representation dispute subject to Section 2, Ninth of the RLA which, as noted above, is the statutory section that imposes various obligations on the Board to protect employee choice. The Board's decision not to ascertain employee wishes is directly traceable to its erroneous interpretation that a "transfer case" is somehow unique under Section 2, Ninth and does not require the Board to consider the wishes of affected employees. Yet, in at least 16 published decisions from 1951 through 1982, the Board interpreted the RLA to require processes designed to ascertain that a transfer of a certification was desired by a majority of the employees involved.[18] In the early 1980s, however, the

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17 In addition to abandoning its statutory duty to conduct the election or appoint a committee of neutrals to do so, the Board argued below that passive "review" of the union's transfer request letters alone met its statutory duty to "investigate" the representational dispute. If no more is required by this Court's decision in *Railway Clerks, supra,* the Board's duty to investigate has also been rendered irrelevant. Some of the more glaring omissions of the Board's purported investigation were (1) failure to ascertain whether there was any integrity to the ballots cast in the UFA poll, (2) failure to ascertain whether then-current employees obtained ballots, (3) failure to evaluate separately the votes of Air Micronesia flight attendants, and (4) failure to establish any mechanism for determining the desires of the current workforce. The NMB transferred the certifications after a five-and-a-half year hiatus between the UFA poll and the request that the Board transfer the UFA certifications to the IAM, despite the Board's recognition of a need for "closer scrutiny" of an election held so long ago and contrary to its own "staleness" rule which prohibits consideration of employee authorization cards which are more than one year old. 29 CFR § 1206.3.

18 For example, when the Air Line Pilots Association ("ALPA") asked the NMB to transfer certifications from ALPA to the newly formed Association of Flight Attendants ("AFA") in 1974, the Board refused to do so merely upon the unions' request. The Board instructed ALPA that "it cannot transfer or amend certifications simply through an agreement between ALPA and its affiliate AFA because under such circumstances the Board has no evidence that the change in representation of employees has the consent of employees involved." Letter from NMB Executive Secretary R.K. Quinn, Jr. to Edward J. Hickey dated Dec. 4,

(continued...)

Board, without explanation, began transferring certifications from one union to another without conducting elections or examining authorization cards from current employees.[19] Such an unexplained change of practice normally would be given little deference by courts reviewing it for consistency with the statute. However, the courts below, relying on decisions applying *Switchmen's Union*, gave dispositive effect to the Board's new transfer cases practice, ignoring both the fact that the Board had changed its practice and the absence of any analysis to justify the change.

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18 (...continued)
1974. The NMB insisted upon a procedure whereby flight attendants affected by the change signed cards authorizing representation by AFA; the Board verified that a majority of those eligible to vote at each carrier had indeed signed cards before transferring the certification. *E.g.*, *Texas International Airlines*, 5 N.M.B. 196 (1976); *Western Airlines, Inc.*, 6 N.M.B. 754 (1979). *Accord, Continental Airlines, Inc.*, 8 N.M.B. Supp. A. 709, 713 (1977) ("The Board refused to transfer the certification on the basis of a private election.") *Ross Aviation*, 9 N.M.B. 162 (1982) (requiring proof that majority of employees assented to transfer of certification); *Pennsylvania R.R.*, 2 N.M.B. 204 (1951) (same).

19 *See Transtar Pilots Ass'n*, 14 N.M.B. 377 (1987), *BRAC*, 13 N.M.B. 408 (1986), *Prinville Ry. Employees Union*, 13 N.M.B. 398 (1986); *UTU*, 13 N.M.B. 6 (1985); and *UTU*, 11 N.M.B. 228 (1984).

## CONCLUSION

If judicial review is precluded here, the RLA's premise that employees will be represented by unions of their own choosing, or by no union at all if that is their choice, will successfully have been negated by the Board. For the reasons above, the writ should be granted.

Respectfully submitted,

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June 15, 1992

# APPENDIX

## APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

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No. 91-5189 September Term, 1991

Continental Airlines, Inc.
Air Micronesia, 91-00796

Appellants

v.

National Mediation Board

and consolidated case No. 91-5190

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: Wald, Sentelle, and Henderson, *Circuit Judges*

JUDGMENT

This case was considered on the record and on the briefs and oral argument of counsel. The Court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. R. 14(c).

Continental Airlines, Inc., and Continental/Air Micronesia appeal from a final order of dismissal issued by the United States District Court. Appellants contend that the National Mediation Board (NMB) did not fulfill the requirements of the Railway Labor Act (RLA), 45 U.S.C. § 152, Ninth, when it conducted an investigation of an election held by the Union of Flight Attendants to gauge member opinion on a merger with the International Association of Machinists and Aerospace Workers (IAM). The NMB responds that § 152, Ninth, governs its investigation of requests by unions to transfer their certification to reflect a merger, and that the NMB's investigation and subsequent certification transfer fully complied with the requirements of § 152, Ninth. We have repeatedly noted that court review of NMB decisions is "one of the narrowest known to the law." *IAM v. TWA*, 839 F.2d 809, 811 (D.C. Cir. 1988). Congress established the NMB to be the body primarily responsible for handling disputes arising under the RLA. As the District Court properly noted below, Congress's intent that the NMB retain broad discretion over matters arising under the RLA allowed the Court merely a "peek at the merits" to determine whether the NMB committed to gross violation of the statute. *Continental Airlines, Inc. and Continental/Air Micronesia v. National Mediation Board*, No. 91-796, June 11, 1991, at 3, quoting *Teamsters v. Bhd. of Ry. Clerks*, 401 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968). From the opinion below and the record, it is abundantly clear that the trial judge satisfied his obligation to "peek" and no more. Consistent with this standard of review and our precedent, it is

ORDERED and ADJUDGED that the grant of defendant's motion to dismiss or for summary judgment is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15(b)(2).

*Per Curiam*

For the Court:

Constance L. Dupré
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| Continental Airlines, Inc., and Continental/Air Micronesia | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 91-796 (CRR) |
| National Mediation Board, | ) | |
| Defendant. | ) | |

OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

Before the Court are cross-motions for summary judgment.[1/] The plaintiffs, two air carriers, challenge the validity of a decision by the National Mediation Board ("NMB" or "Board") to transfer the certifications from an employee union to its successor after the merger of the two unions. The NMB argues that the Court lacks jurisdiction to grant the plaintiffs relief. After careful consideration of the parties' memoranda, the arguments of counsel, the underlying law, and the entire record herein, the Court shall grant summary judgment for the NMB and dismiss this case.

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1/ On May 18, 1991, the defendant filed a Motion to Dismiss or for Summary Judgment. Because the defendant's motion refers to matters outside the pleadings, the Court shall treat the motion as one for summary judgment under Rule 56. *See* Fed. R. Civ. P. 12(c).

## I. Background

There is no genuine dispute as to the material facts. On September 13, 1989, the Union of Flight Attendants ("UFA") and the International Association of Machinists & Aerospace Workers ("IAM&AW") requested that the NMB transfer certifications issued to UFA in NMB Case Nos. R-5352 and R-5337 to the IAM&AW after the merger of the two organizations. The NMB then investigated the circumstances of the IAM/UFA merger for one year.[2/] The Board considered hundreds of pages of evidence and also reviewed submissions by the plaintiffs attacking the validity of the union merger.

The Board concluded from its investigation that UFA had merged into the IAM in 1984; the UFA flight attendants had supported the merger in an internal ratification election by a vote of 1,077 to 161; the ratification vote was free of procedural irregularities; despite the five-year delay, the unions had timely filed a transfer request; and a transfer of certifications from UFA to IAM was appropriate. *See In Re: Rep. of Empl. of Continental Airlines and Air Micronesia--Flight Attendants,* 18 N.M.B. 40 (1990).

The plaintiffs filed the instant suit challenging the Board's decision on the ground that the Board failed to investigate properly the unions' request for a transfer of certifications. The plaintiffs argue that NMB violated the Railway Labor Act and the Constitution by basing its transfer decision on a union merger ratification vote which occurred in 1984 and which was based on a plurality vote.

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2/ It is the practice of the Board not to use its election procedures in transfer request investigations. In most cases, the Board grants a transfer request based on assertions contained in the request letters. *See, e.g., Transtar Pilots,* 14 N.M.B. 377 (1987); *City of Prinevill Ry. Empl. Union,* 13 N.M.B. 398 (1986); *Bhd. of Ry. Airline & S.S. Clerks,* 13 N.M.B. 408 (1986); *United Transportation Union,* 13 N.M.B. 6 (1985); *United Transportation Union,* 11 N.M.B. 228 (1984).

## II. Analysis

### A. The Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure requires that the Court grant a motion for summary judgment if the pleadings and supporting affidavits and other submissions "show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." It is well established that the Court must believe the nonmovants' evidence and draw all justifiable inferences in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[t]he mere existence of a scintilla of evidence in support of the [nonmovants'] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovants]." *Id.* at 252.

### B. The Scope of Judicial Review

Under the Railway Labor Act ("RLA"), judicial review of a Board decision is "one of the narrowest known to the law." *Internat'l Ass'n of Machinists v. TWA*, 839 F.2d 809, 811 (D.C. Cir. 1988), *amended* 848 F.2d 232, *cert. denied*, 488 U.S. 20 (1988). A reviewing court only takes a "peek at the merits" to determine whether it is "obvious on the face of the papers" that the Board totally failed to undertake an investigation of a representation dispute. *Teamsters v. Bhd. of Ry. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968); *see Brotherhood of Ry. & S.S. Clerks v. Ass'n for the Benefit of Non-Contract Employees*, 380 U.S. 650, 661 (1965). The Court "is empowered to proceed no further" unless the "peek" reveals such an obvious error. *Prof. Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 463 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 497 (1989).

The Court may review Board decisions which violate its "clear and mandatory" statutory duties, *Leedom v. Kyne*, 358 U.S. 184, 188 (1958), but only if the violation is obvious without the need for "arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide." *Brotherhood of Ry. & S.S. Clerks*, 380 U.S. at 671; *see Prof. Cabin Crew*, 872 F.2d at 459; *Teamsters v. NMB*, 136 L.R.R.M. 2193, 2194 (D.D.C. 1990).

The central issue in this case is whether the NMB failed to carry out its statutory duty to investigate the representation dispute. *See Brotherhood of Ry. & S.S. Clerks*, 380 U.S. at 661 ("the Board's action here is reviewable only to the extent that it bears on the question of whether it performed its statutory duty to 'investigate' the dispute"). The focus of the inquiry is whether the Board investigated the dispute, not how it conducted its investigation:

> [R]eviewing a certification after an investigation by the NMB and reviewing whether the NMB made its statutory investigation at all are two completely different matters. While we cannot, and do not review the former, we can and do review the latter.

*In-Flight Catering v. NMB*, 555 F.2d 712, 717 (9th Cir. 1977). Here, the plaintiffs fail to meet their heavy burden of proving that the Board committed an error of "constitutional dimension or gross violation of the [RLA]." *Internat'l Brotherhood of Teamsters v. Brotherhood of Ry., Airline & S.S. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied sub nom., Brotherhood of Ry., Airline & S.S. Clerks v. NMB*, 393 U.S. 848 (1968).

C. Plaintiffs' Contentions

At bottom, the plaintiffs advance three major arguments that the NMB's investigation violated the RLA. The plaintiffs complain the Board based its transfer decision on (1) a union's ratification vote (2) that occurred in 1984 and (3) in which a plurality of flight attendants supported the merger. Moreover, the plaintiffs argue that NMB violated the Constitution. However, the plaintiffs fail to demonstrate that the NMB violated a clear and mandatory duty, and therefore judicial review is unavailable. *See Teamsters,* 136 L.R.R.M. at 2194.

1. NMB Did Not Violate the RLA By Basing Its Transfer Order on the Union Merger Ratification Vote

The plaintiffs argue that RLA § 2, Ninth prohibits the Board from granting the request for transfer of certifications on the basis of the unions' merger ratification vote. This argument must fail. Section 2, Ninth provides in that conducting an *election,* the Board:

> shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after a hearing shall within 10 days designate the employees who may participate in the election.

While this language requires the Board to take certain steps when and if it decides to conduct an election, the RLA does not prohibit the Board from investigating the circumstances of a union merger ratification vote and granting a transfer of certifications based on that vote if the circumstances warrant. Section 2, Ninth imposes no "clear and mandatory" obligation

on the NMB to refrain from investigating the circumstances of a union merger vote and to abstain from granting a transfer of certifications based on that vote. *Cf. Teamsters*, 136 L.R.R.M. at 2194 (rejecting the analogous argument that the RLA imposed a clear and mandatory duty on the Board to refrain from investigating in the wake of a carrier request).[3/]

2. NMB Did Not Violate the RLA By Basing Its Transfer Order on Five-Year-Old Data

The plaintiffs allege that NMB violated the RLA by basing its transfer decision on the UFA's ratification vote, which had occurred five years before the Board's investigation.[4/] However, the plaintiffs fail to demonstrate that the Board violated any clear and mandatory provision of the RLA by using the five-year-old data. The resolution of the issues concerning the timeliness of the data was within the Board's discretion, and did not rise to a "gross violation of the statute." For example, in *British Airways Bd. v. NMB*, 685 F.2d 52 (2d Cir. 1982), the Court of Appeals held that "[s]electing a cutoff date, even though as events unfolded it

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3/ In addition to joining the arguments raised by Continental, plaintiff Continental/Air Micronesia alleges that the NMB failed to investigate in any way the choice of its flight attendants as a separate unit from the Continental flight attendants. Citing several election request cases, Continental/Air Micronesia concludes that the Board failed to perform its statutory duty to investigate the free choice of a majority of its flight attendants. However, the record shows that the NMB did conduct an investigation, and its decision regarding how to ascertain the level of participation of employees in a union ratification vote is within its discretion in a transfer request case. Continental fails to demonstrate that the Board violated a clear and mandatory provision of the RLA, and therefore judicial review is unavailable. *See Teamsters*, 136 L.R.R.M. at 2194-95 (and cases cited therein).

4/ Though noting that the transfer request deserved "closer scrutiny" because of the lapse of time, the Board determined that the unions had "acted reasonably under the circumstances" because a no-raiding provision in the AFL-CIO constitution had barred an earlier filing. *In Re: Representation of Employees*, 18 N.M.B. at 53.

was not possible to conduct the election until more than two years after the date, and counting ballots that reasonably appeared from postmarks to have arrived at the post office before the deadline were decisions well within [NMB's] discretion," and therefore the District Court had no jurisdiction to review NMB's certification in the election case. *Id.* at 55. *See also USAir v. NMB,* 711 F. Supp. 285 (E.D. Va.), *aff'd,* 894 F.2d 603 (4th Cir. 1989) (NMB's refusal to adjust voter eligibility cut-off dates for representation election to accommodate 197 employees not subject to judicial review). The Board was within its discretion in examining the circumstances surrounding the unions' delay in filing a petition and considering that petition "timely filed."

3. The RLA Did Not Prohibit the NMB from Basing its Transfer Order on a Plurality Vote

The plaintiffs also contend that NMB violated the RLA because the union merger ratification on which the NMB relied was based on a plurality vote and did not reflect the wishes of the majority of the employees. NMB found that 1,077 to 161 of the votes cast in the union merger ratification election favored the merger.

However, the plaintiffs argue that only 41% of those employees receiving ballots, and only 37% of those eligible to vote, voted in the election for merger ratification. Yet the plaintiffs fail to show that the Board abused its discretion and breached a clear and mandatory duty in determining that the vote reflected that the flight attendants supported the IAM/UFA merger. *Cf. Radio Officers' Union v. NMB,* 181 F.2d 801 (D.C. Cir. 1950) (relying on Attorney General opinion stating NMB has "the power to certify a representative which receives a majority of the votes cast despite the fact that less than a majority of those eligible voted"). Although almost 87% of the 1,245 employees who voted supported the merger, the plaintiffs argue that the Board

should have counted nonvoters as effectively voting against the merger. The plaintiffs conclude that NMB should have determined that the majority of employees were against the merger.

The plaintiffs fail to show that their logic is supported by the RLA. The RLA did not require an NMB-sponsored election in this transfer request case, and no statutory language prescribes how the NMB should assess the views of nonvoters in union elections.[5/] The method used by NMB to determine that the employees supported the union merger and the form of the ballot used by IAM in this case are not subject to judicial review. *Cf., Zantop Internat'l Airlines, Inc. v. NMB*, 732 F.2d 517, 522 (6th Cir. 1984) (election case holding that "neither the method by which the Board determined that a majority favored representation . . . nor the form of the ballot is subject to judicial review").

In sum, while NMB's procedures were not what the plaintiffs may have hoped for, its investigation was not "so inadequate to be a non-performance of its statutory duties" under the RLA. *See British Airways Bhd.*, 685 F.2d at 55.

4. NMB Did Not Violate the Constitution

In addition to alleging statutory violations, the plaintiffs argue that the Board violated the Free Speech Clause of the First Amendment and the Due Process Clause of the Fifth Amendment because its decision has "no basis in fact

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5/ Even in election cases, the NMB has discretion to treat a nonvoter as either (1) acquiescing in the will of the majority or (2) voting for no representation. Compare *Virginian Ry. v. System Federation*, 300 U.S. 515, 560 (1937) (upholding NMB certification because nonvoters "are presumed to assent to the expressed will of the majority of those voting") with *Ry. Clerks*, 380 U.S. at 670 (upholding practice in NMB-sponsored elections that "if the employee refuses to vote, he is treated as having voted for no representation"). The Board's practice in election request investigations to inform eligible voters that abstention from voting is a vote for no representation does not apply to a union merger ratification vote.

and law." The plaintiffs fail to show that the actions of the Board impinged on any rights protected by the Constitution, and their arguments are frivolous. *See Prof. Cabin Crew,* 872 F.2d at 463, n.4 ("We have carefully considered appellant's contention that the inclusion of the former strikers violated the current workers' First Amendment and due process rights. We find the argument totally without merit, and need spend no time refuting it."), *cert. denied,* 110 S. Ct. 497 (1989) (citing *Internat'l Ass'n of Machinists,* 839 F.2d at 812).

## III. Conclusion

For all of the foregoing reasons, the Court shall grant the defendant's Motion to Dismiss or for Summary Judgment and shall dismiss this case from the dockets of the Court. None of the alleged violations advanced by the plaintiffs rise to a "constitutional dimension or gross violation of the [RLA]," *Internat'l Brotherhood of Teamsters,* 402 F.2d at 205, and therefore the Court lacks the power to grant the plaintiffs relief. The Court shall issue an Order of even date herewith in accordance with this opinion.

June 10, 1991

Charles R. Richey
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| Continental Airlines, Inc., and Continental/Air Micronesia | ) | |
| Plaintiffs, | ) | |
| v. | ) | Civil Action No. 91-796 (CRR) |
| National Mediation Board, | ) | |
| Defendant. | ) | |

ORDER

In accordance with the Court's Opinion of even date herewith, it is, by the Court, this 10th day of June, 1991,

ORDERED that the Motion for Summary Judgment by plaintiff Continental Airlines shall be, and hereby is, denied; and it is

FURTHER ORDERED that the Motion for Summary Judgment by plaintiff Continental/Air Micronesia shall be, and hereby is, denied; and it is

FURTHER ORDERED that the defendant's Motion to Dismiss or for Summary Judgment shall be, and hereby is, granted; and it is

FURTHER ORDERED that the above-captioned case shall be, and hereby is, dismissed from the dockets of the Court.

Charles R. Richey
UNITED STATES DISTRICT
JUDGE

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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| | 18 NMB No. 13 |
| In the matter of<br>Representation of Employees | File No. C-6232<br>(Case Nos. R-5352<br>and R-5337) |
| of | |
| Continental Airlines, Inc.<br>and<br>Air Micronesia | FINDINGS UPON<br>INVESTIGATION -<br>TRANSFER OF<br>CERTIFICATIONS |
| Flight Attendants | |
| | October 31, 1990 |

On September 13, 1989, the Union of Flight Attendants (UFA) and the International Association of Machinists & Aerospace Workers (IAM&AW) requested that the National Mediation Board (Board) transfer certifications issued to UFA in NMB Case Nos. R-5352 and R-5337 to the IAM&AW due to a merger of these two organizations. In those cases, UFA was certified to represent the craft or class of Flight Attendants, employees of Continental Airlines, Inc. and Air Micronesia, respectively. The request was made because UFA had merged into the IAM&AW.

The request was assigned NMB File No. C-6232. Senior Hearing Officer Roland Watkins was assigned to investigate the request.

## PROCEDURAL HISTORY OF THE UFA/IAM&AW REQUEST

On September 15, 1989, the Board requested that UFA and the IAM&AW provide information on the merger. This information was submitted on October 20, 1989. Additional information was furnished on December 14, 1989, and June 14, 1990.

By letter dated July 17, 1990, the Board allowed Continental Airlines (Continental) , Transport Workers Union of America (TWU) and the Flight Attendants for Free Choice (FAFC) the opportunity to submit written comments on the IAM&AW's and UFA's request. In its letter, the Board noted that TWU, on March 18, 1988, filed an application alleging a representation dispute involving the Flight Attendants of Continental Holdings (Eastern Airlines and Continental Airlines). That application was assigned NMB File No. CR-6066.[1/] FAFC filed an application seeking to intervene in that case on April 26, 1988.

On August 2, 1990, Continental submitted written comments. The IAM&AW, on that same date, submitted additional comments. In a letter dated August 13, 1990, Air Micronesia commented on the IAM&AW's requests. More information was submitted by the IAM&AW on September 18, 24 and October 1, 5 and 19, 1990. No comments were submitted by either TWU or FAFC.

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1/ This application was later dismissed without prejudice by the Board on August 17, 1990. *See*, 17 NMB 432 (1990).

## CONTENTIONS

### IAM&AW

The IAM&AW contends that UFA merged into the IAM&AW in 1984. The IAM&AW alleges that all of the Flight Attendants at Continental and Air Micronesia were informed of the merger agreement and allowed the opportunity to vote on ratification of the merger agreement. Upon approval of the merger agreement by the Continental and Air Micronesia Flight Attendants in 1984, the IAM&AW contends that UFA immediately became District Lodge 144 of the IAM&AW. The IAM&AW alleges that "the transfer of the certifications will thus recognize what has been the case for the past several years."

### Continental

Continental alleges that the "results of the 1984 'election' are stale and unreliable." In addition, the Carrier alleges that "the IAM may not be certified because a majority of Continental employees now reject UFA-IAM representation." Finally, Continental alleges that UFA must surrender its certification as "it no longer represents Continental Flight Attendants." In this regard, Continental argues that the Board should "accept UFA's surrender of its certificate" and not "reissue" any certificate until after the Board has conducted an election.

### Air Micronesia

Air Micronesia contends that the IAM&AW does not represent its Flight Attendants.

18 N.M.B. No. 13

## FINDINGS OF FACT

### UFA Certifications

#### Air Micronesia

On September 1, 1982, UFA alleged a representation dispute involving the Flight Attendants of Air Micronesia. The application was docketed as NMB Case No. R-5337.

The investigation disclosed that a dispute existed among the craft or class of Flight Attendants and the Board authorized an election by secret ballot to determine the employees' representation choice. A count of the ballots produced the following results:

| | |
|---|---|
| Total eligible employees. . . . | 22 |
| Votes for UFA . . . . . | 11 |
| Votes for any other organization or individual . . . | 1 |

On November 3, 1982, UFA was certified to represent the craft or class of Flight Attendants at Air Micronesia. 10 NMB 54 (1982).

#### Continental Airlines

The services of the Board were invoked by UFA, on September 27, 1982, to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, personnel described as "Flight Attendants", employees of Continental including former employees of Texas International Airlines.

At the time the application was received, UFA represented Flight Attendants on Continental. 6 NMB 88

(1976). Former employees of Texas International Airlines were represented by the Association of Flight Attendants (AFA). 5 NMB 196 (1976).

The investigation disclosed that a dispute existed among the craft or class of Flight Attendants on the merged carrier and the Board authorized an election by secret ballot to determine the employees' representation choice. A count of the ballots produced the following results:

| | |
|---|---|
| Total eligible voters . . . . | 2807 |
| Votes for UFA . . . . . | 1770 |
| Votes for AFA . . . . . | 127 |
| Votes for any other organization or individual . . . . | 3 |
| Void . . . . . | 19 |

As a result of the election, UFA was certified, in R-5352, to represent the craft or class of Flight Attendants of Continental on January 18, 1983. 10 NMB 126 (1983).

IAM&AW/UFA Merger Agreement Election

On February 23, 1984, UFA announced that it had entered into a merger agreement with the IAM&AW. The agreement stated that "it is expressly understood that the IAM Constitution shall be the governing document of the merged organization." The agreement also stated:

> Due to Continental Airlines' bankruptcy filing and the strike against Continental by UFA members, the IAM shall provide the District with $30,000 per month, beginning with the month in which this Merger Agreement

is ratified. Said subsidy shall include coverage of all District salaries for employees and business representatives, and other expenses related to the normal operation of the District.

. . . It is understood that the IAM assumes responsibility for fees and expenses related to representation in the current bankruptcy as well as all current outstanding litigation. It is expressly understood by the parties that all litigation shall be coordinated with the General Counsel of the IAM and the Air Transport Division. . .

It is understood by the parties to this merger agreement that upon ratification of said agreement, the District Lodge shall be assigned by the IAM to be responsible in accordance with IAM laws and policies for the negotiation and administration of all collective bargaining agreements governing members within its jurisdiction, including but not limited to, the present collective bargaining agreements, to wit the Flight Attendant agreements at Continental Airlines, Texas International Airlines and Air Micronesia. It is further

> understood that concurrent with the ratification of this merger agreement by a majority vote of the UFA membership voting by mail ballot, the present certifications and the present existing collective bargaining agreements shall be transferred into the name of the IAM.

On February 16, 1984, UFA sent the following telegram to John Adams, Vice President-Personnel, of Continental Airlines:

> The Union of Flight Attendants, Local #1, will soon be conducting an election by mail ballot among all Continental Flight Attendants concerning a merger with another labor organization. [UFA] wants everyone in the Flight Attendant class and craft represented in this election. It is our intent that all Flight Attendants participate in this vote, including those Flight Attendants hired subsequent to September 1, 1983.
>
> The election will be conducted in accordance with the Constitution and Bylaws of [UFA]. The Union has hired a neutral arbitrator to conduct the vote.
>
> The Union would like to make certain that our name and address

> roster is accurate and up-to-date. Please forward to the [UFA] offices in Los Angeles, the names and addresses of all Continental Flight Attendants, including those Flight Attendants who were not on the former CAL or former TXI Flight Attendant system seniority lists prior to September 1, 1983. [UFA] will be more than happy to provide personnel to meet with the company and assist in compiling this information. It is necessary that this information be received by February 24, 1984 in order for the Flight Attendants to receive ballots.

In a telegram addressed to UFA and dated February 24, 1984, Adams acknowledged UFA's request but refused to furnish the information. UFA again requested the names and addresses in a telegram dated February 29, 1984. In that telegram, UFA stated that "it is conducting a vote which we wish to have all Continental Flight Attendants participate in regarding (sic) a merger with another labor organization." UFA, in a letter, dated March 5, 1984, to Continental requested the names and addresses of all Continental Flight Attendants "to verify" addresses on file and "to make certain that the Flight Attendants who were hired by the Company on or after September 1, 1983 would receive ballots." In addition, UFA requested that certain enclosed notices "be posted in a prominent place in all Flight Attendant lounges and check-in facilities and on all Flight Attendant bulletin boards." The notice informed all Flight Attendants of the terms of the merger agreement and the ratification vote which

UFA was conducting. In a letter to UFA dated March 7, 1984, Continental refused to furnish the information. In that letter, Adams acknowledged that UFA sought "names and addresses of all active Continental Flight Attendants for use by UFA to conduct an election among Continental's Flight Attendants for the purpose of merging UFA into the IAM."

Without any assistance from Continental, UFA compiled a list of Flight Attendants from the seniority lists of Continental and Texas International. UFA had a seniority list and the addresses of all the Air Micronesia Flight Attendants. On March 1, 1984, UFA sent election ballots to all of the Continental and Air Micronesia Flight Attendants on its seniority lists. UFA's Code-a-Phone message for March 1, 1984, informed Flight Attendants of the mailing. Flight Attendants were reminded of the ratification process in Code-a-Phone messages on March 2, 6, 8 and 12, 1984.

With the ballot, UFA enclosed a letter from the UFA Executive Board and a return envelope addressed to the arbitrator. The letter from the UFA Executive Board accurately summarized the merger agreement. The Flight Attendants were instructed that the deadline for receipt of the ballot was March 20, 1984. The ballot stated:

> [ ] I vote FOR the merger between UFA and the International Association of Machinists and Aerospace Workers (IAM)
>
> [ ] I vote AGAINST the merger between UFA and the International Association of Machinists and Aerospace Workers (IAM)

The combined seniority lists contained a total of 2,706 names of which UFA obtained addresses for 2,615 individuals.

On March 26, 1984, Arbitrator William Levin counted all ballots received at the Post Office by the March 20, 1984, deadline. The arbitrator certified that 1,245 ballots were returned in a timely manner and of that amount 1,077 voted "FOR" and 158 voted "AGAINST" with 3 voting "no union". In a code-a-phone message for March 27, 1984, Flight Attendants were informed of the approval of the merger agreement.

UFA, on April 12, 1984, informed the IAM&AW that the Flight Attendants approved the merger agreement.

IAM&AW/UFA/AFA Article XX Proceeding

I.

Article XX of the Constitution of the American Federation of Labor and Congress of Industrial Organization (AFL-CIO), effective January 1, 1962, provides:

> Section 2. Each affiliate shall respect the established collective bargaining relationship of every other affiliate. No affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate...

The AFL-CIO Executive council, in a statement dated January 8, 1982, notified its members of the approval of the following policy statement concerning Article XX:

> ... The Council therefore determines that Article XX protection shall last for five years after the loss of representation rights that had been subject to such protection with the provisos: first, that the affiliate that had enjoyed that protection may seek and the Council may grant three-year extensions of this five-year period of protection; and second that any affiliate that had been found to have caused the loss of such representation rights shall continue to be forever barred by Article XX from seeking to secure those representation rights.

II.

On March 18, 1976, the Air Line Pilots Association (ALPA) and AFA requested that the Board transfer the certification issued to ALPA in R-3745 covering the craft or class of Flight Attendants, of Texas International Airlines to AFA. This request was made as a result of an Agreement, effective December 31, 1973, where the Steward and Stewardess Division of ALPA was reconstituted as AFA, an affiliate of ALPA. Based upon its investigation, the Board, on April 28, 1976, transferred the certificate from ALPA to "AFA affiliated with ALPA." 5 NMB 196 (1976).

UFA, on September 17, 1976, alleged a representation dispute involving the Flight Attendants of Continental. The employees had been represented by ALPA. After an election, the Board, on November 15, 1976, certified UFA as the representative of the Flight Attendants on Continental. 6 NMB 88 (1976).

In 1982, the operations of Texas International Airlines were merged into Continental. As noted above, the Board, in R-5352, certified UFA, on January 18, 1983, to represent the craft or class of Flight Attendants of Continental including former employees of Texas International Airlines.

In 1982 when the AFL-CIO amended its Constitution and Bylaws to establish the five year cap on Article XX protection, all its member unions were provided a one time opportunity to file a three year extension on any previously represented group to which they had Article XX rights. ALPA's Article XX rights to the Continental Flight Attendants would have expired under the new five year cap provision. However, ALPA "filed for the three year extension at the insistence of AFA."

On February 22, 1984, the AFL-CIO Executive Council voted to issue a charter to AFA as a full affiliate of the Federation. UFA, on February 29, 1984, announced its merger agreement with the IAM&AW. In a letter dated March 8, 1984, and addressed to the IAM&AW, AFA advised the IAM&AW that it may be in violation of Article XX.

In a letter to the AFL-CIO, dated March 22, 1984, officially charged the IAM&AW with a violation of Article XX.

Mediation of the dispute pursuant to the internal dispute resolution (Article XX) plan was unsuccessful. An impartial umpire held a hearing on July 11, 1984. The impartial umpire issued his determination on July 25, 1984. He determined that AFA did not have Article XX rights to the Flight Attendants at Continental and concluded that the IAM&AW did not violate Article XX. The impartial umpire datelined that the "acts of the International Association of Machinists complained of by the Association of Flight Attendants are not in violation of Section 2 of Article XX of the Constitution of the AFL-CIO."

AFA appealed the determination to the President of the AFL-CIO who referred the appeal to the Article XX Appeals Committee which has final authority. The Appeals Committee, on December 19, 1984, ruled that AFA did have Article XX rights to the Continental Flight Attendants and held that the IAM&AW was in violation of Article XX.

Because of this decision, the IAM&AW had to wait until the expiration of the five year period, which was in 1989, to file its transfer request with the Board. The five year period runs either from the date that the AFL-CIO affiliate lost the election or from the date of the complaint to the AFL-CIO. In this case, the latest date is that of AFA's letter to the AFL-CIO (March 22, 1989). At the expiration of the five year period in 1989, AFA did not seek an additional three year extension.

## DISCUSSION

### I.

The Board's investigation in this matter establishes that UFA was certified to represent the particular crafts or classes of employees for which a transfer of certifications has been requested.

Those certifications, NMB Case Nos. R-5337 and R-5352, dated November 3, 1982, and January 18, 1983, respectively, remain in effect.

### II.

UFA merged into the IAM&AW in 1984. The UFA/IAM&AW merger process included an election among the Flight Attendants at Continental and Air Micronesia. Continental argues that the election process was a "sham." The Board finds that the election process afforded substantially all the employees at that time a reasonable opportunity to vote. UFA requested on numerous occasions that Continental furnish names and addresses so that the organization could mail a ballot to every eligible employee. Continental refused to furnish the information. UFA was able to compile a list of Flight Attendants on Continental and Air Micronesia and mailed ballots to 2,615 of the 2,706 individuals (Continental and Air Micronesia) or approximately 97% of the combined group. A majority of those voting approved the merger. Investigation revealed no evidence of any election irregularities. Furthermore, since 1984, UFA has operated as a District Lodge of the IAM&AW. The IAM&AW provides the funds for UFA to operate as a District Lodge.

III.

In the present case, the Board was not notified until 1989, of the merger which occurred in 1984. Because of the passage of time, the IAM&AW's and UFA's request required closer scrutiny by the Board. Investigation revealed that the IAM was barred by the Article XX matter from filing any request with the Board. After the expiration of the five year period, the IAM&AW and UFA did indeed file. In light of the Article XX proceeding the Board finds that the IAM&AW and UFA acted reasonably under the circumstances and, therefore, the Board accepts the request as being timely filed.

## CONCLUSION

Based upon its investigation, the National Mediation Board hereby finds that UFA has merged into the IAM&AW and transfers the certifications issued to UFA in R-5352 (Continental) and R-5337 (Air Micronesia) to the IAM&AW.

By direction of the NATIONAL MEDIATION BOARD.

William A. Gill, Jr.
Executive Directive

(2)

No. 91-2009

Supreme Court, U.S.
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JUL 15 1992
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

Continental/Air Micronesia and
Continental Airlines, Inc.,

*Petitioners*,

v.

National Mediation Board,

*Respondent*.

# BRIEF OF AIRLINE INDUSTRIAL RELATIONS CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Relations Conference

July 15, 1992

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Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487 (1983) . . . . . 7

In The
Supreme Court of the United States
October Term, 1991

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No. 91-2009

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Continental/Air Micronesia and Continental Airlines, Inc.,

*Petitioners*,

v.

National Mediation Board,

*Respondent*.

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Brief of
Airline Industrial Relations Conference
As Amicus Curiae In Support Of Petition
For A Writ Of Certiorari To The
United States Court Of Appeals
For The District of Columbia Circuit

## INTEREST OF THE AMICUS CURIAE

Airline Industrial Relations Conference ("AIR Conference"), and its member air carriers,[1] are vitally

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1 AIR Conference is an unincorporated voluntary association of United States scheduled air carriers formed to facilitate the exchange of ideas and information concerning personnel and labor relations matters, and to represent the member carriers in legislative, judicial and administrative matters. The members include ABX Air, Inc., Air Wisconsin, Alaska

(continued...)

concerned that whenever the National Mediation Board ("NMB" or "the Board") certifies a union, the certification reflects the voluntary choice of a majority of the employees in question. The premise of majority rule in representation cases is the "essential foundation"[2] of the bargaining scheme created by Congress under the Railway Labor Act, 45 U.S.C. § 151 et. seq. ("RLA" or "the Act"), and the "great right"[3] protected by the Act. This "great right" must be safeguarded from administrative nullification.

AIR Conference includes virtually every major air carrier in the United States. Not only does this industry employ over half a million people, with a total operating revenue of $76 billion in 1991, it also performs a vital function in the economy as a whole, transporting 452 million passengers over 447 billion miles in 1991. Congress recognized the indispensable contribution of the airlines in interstate commerce when, in 1936, it added airlines to the coverage of the RLA.

The lengthy and expensive procedures for dispute resolution under the RLA are designed to lead to the peaceful resolution of labor disputes and avoid interruptions to interstate commerce. These procedures unfairly bind the employees and the carrier if the union that is certified is not

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1 (...continued)
Airlines, Inc., Aloha Airlines, Inc., America West Airlines, American Airlines, Inc., American Trans Air, Continental Airlines, Inc., Delta Air Lines, Inc., Federal Express Corp., Northwest Airlines, Inc., Reeve Aleutian Airways, Inc., Southwest Airlines, Tower Air, Trans World Airlines, Inc., United Airlines, Inc., United Parcel Service, and USAir, Inc. American Airlines and United Airlines do not join in AIR Conference's Brief.

2 *Texas & N.O. R.R. v. BRAC*, 281 U.S. 548, 569 (1930).

3 *General Comm. v. Missouri-K-T R.R.*, 320 U.S. 323, 333 (1943).

truly the chosen representative of a majority of the employees, as the Court has emphasized:

> "Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to . . . interstate commerce may be maintained. . . . [i]t is of the essence . . . that this liberty should be safeguarded."

*General Comm. of Adjustment v. Missouri-K-T R.R.*, 320 U.S. 323, 329-30 (1943) (quoting *Texas & N.O. R.R. v. BRAC*, 281 U.S. 548, 569 (1930)).

AIR Conference believes that this is particularly true because the RLA places restrictions upon carriers that are not imposed upon other industries, whose labor obligations are established and governed by the National Labor Relations Act ("NLRA"). Some of the more significant differences between the duties imposed by the RLA and the NLRA include:

1. The RLA does not expressly provide for decertification, unlike the NLRA in 29 U.S.C. § 159 (c).[4] Under the NLRA, an employer's good faith doubt of continued majority support based on objective circumstances allows an employer to withdraw recognition. Under the RLA, the only court that has addressed the question has held the

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4 *See infra* note 16.

NLRA rule does not apply, and that a carrier must bargain with a certified union regardless of objective evidence that it does not have majority support. *Alitalia Airlines v. NMB,* 753 F.2d 3 (2d Cir. 1985).

2. The bargaining obligation imposed upon covered carriers by the RLA is far more extensive in scope than the correlative duty imposed by the NLRA. Under the NLRA, an employer may bargain to impasse with the union and thereupon implement the terms and conditions it has bargained. *NLRB v. Katz,* 369 U.S. 736 (1962). Under the RLA, by contrast, carriers are bound by statute to the status quo throughout lengthy dispute resolution procedures, which may include direct bargaining, mediation by the NMB, a proffer of arbitration by the NMB, a 30-day cooling off period, and a Presidential Emergency Board. The terms of a collective bargaining agreement remain in effect throughout these "almost interminable"[5] procedures, often for years after the agreement's expiration date.

3. A union governed by the RLA not only is free to strike, but also may engage in secondary boycotts that seriously disrupt interstate commerce generally, as well as the specific operation of the struck carrier. *Burlington Northern R.R. v. BMWE,* 481 U.S. 429 (1987). Airline and railroad operations are particularly vulnerable to secondary boycotts. Because of their far-flung operations, carriers enter into numerous agreements with other carriers to provide needed services (e.g. maintenance, baggage handling, or ticketing at distant stations, railroad interchange agreements). A union can wreak economic damage upon the primary carrier by its

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5 *Detroit & Toledo S.L. R.R. v. UTU,* 396 U.S. 142, 149 (1969).

attack upon other carriers that provide such supportive services.

For these reasons, it is even more essential that the NMB's certification of a union rest upon the desires of a majority of the employees. Absent the consent of the governed, employee disaffection will lead to unnecessary workplace disruption and labor disputes, frustrating the regime created by Congress under the RLA.

This case provides a classic example of the practical implications of the bedrock majority representation principle. In this case, the NMB transferred a certification from the Union of Flight Attendants ("UFA") to the International Association of Machinists and Aerospace Workers ("IAM") without any attempt to determine whether a majority of the employees desired IAM representation.

This change of representation is of great significance for both the employees and the carrier. In contrast to the UFA, an independent union that represented employees only at Continental and Continental/Air Micronesia (a separate division of Continental which is separately certified by the NMB), an international union like the IAM is likely to have interests that reach beyond the confines of the particular carrier. The IAM is well known for "pattern bargaining" whereby it insists that each carrier agree to terms no less favorable than those achieved at other carriers, ratcheting up wages and working conditions throughout the entire industry. Such pattern bargaining can foster intransigent bargaining positions if the union pays less attention to unique factors or economic necessities at a particular carrier than to the interests of union members elsewhere.

The NMB's decision here to allow transfer of a certification without even examining whether the new union has any support among the employees creates the potential for a "market" in certifications. Nearly defunct unions like UFA

(that lost support in an unsuccessful strike) may be taken over by large international unions that assume the waning union's operating expenses and pay its salaries. Under the NMB's policy announced in this case, the Board will transfer certifications in such circumstances without examining whether the new union is an entirely different bargaining entity than the old union, with an entirely different relationship to the employees whom it ostensibly represents, and whether the employees desire to be represented by the new union.[6] Once the transfer of certification is effected, the employees have no ready mechanism to rid themselves of the new union.

Accordingly, the members of AIR Conference have an interest in ensuring that the NMB fulfills its statutory duty to investigate the wishes of employees in all representation disputes, including those that entail transfer of certification from one union to another. The NMB's decision in this case to transfer two certifications without regard to the employees' choice is a perversion of the statutory scheme. It is critical that the Board be directed to certify only a union that is in fact the choice of a majority of employees.

## ARGUMENT

In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), the Court held that a decision of the

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6 In *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986), the Court viewed union mergers as internal matters outside the jurisdiction of the NLRB *only* if they did not entail a question concerning representation. Under the NLRA, a question concerning representation is present if there is discontinuity in the rights and obligations between the union's leadership and membership, as shown by such factors as whether the two have the same officers, internal organization, dues structures, and whether employees have the same voice in decisions such as approval of collective bargaining agreements, and calling strikes. In this case, the NMB has agreed that the transfer of certification from UFA to IAM created a representation dispute subject to section 2, Ninth of the RLA.

NMB concerning the appropriate grouping of employees[7] for representation purposes was not subject to judicial review, principally because the RLA provides for review in certain sections but is silent as to judicial review of NMB decisions concerning jurisdictional disputes under section 2, Ninth.[8] Subsequent courts have interpreted *Switchmen's* broadly to bar review of virtually all NMB representation decisions.

Courts have expanded the reach of *Switchmen's* even though the judicial attitude that led to the *Switchmen's* decision has changed markedly. Since passage of the Administrative Procedure Act, the sustained effort of administrative law has been to "continuously narrow[] the category of actions considered to be so discretionary as to be exempted from review." Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487, 1489 n.11 (1983). Due to the broad presumption in favor of judicial review that now exists in American jurisprudence, the Court

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7 One rationale why judicial review was not available was that Congress could not have intended this particular "explosive problem," 320 U.S. at 303, to be "drag[ged]. . . into other tribunals of law," *id.* at 305. The legislative history used to support this point refers only to jurisdictional disputes between unions at issue in *Switchmen's*, not to *all* representation questions under section 2, Ninth.

8 "[T]he danger of relying on inference was exemplified precisely in the *Switchmen's* case, in which the materials for inference were negligible and the result reflected a judicial rather than a legislative attitude." Louis L. Jaffe, *The Right to Judicial Review II*, 71 Harv. L. Rev. 769, 791 (1958). Today, it no longer would be permissible to infer that Congress meant to preclude review simply because Congress did not specifically provide for review:

> the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review.

*Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 231 n.4 (1986).

should reconsider *Switchmen's*. At the very least, the Court should clarify whether *Switchmen's* properly is being used by the lower courts to bar judicial review in virtually all representation matters, even those which implicate the fundamental rule of majority choice.

Judicial review has become the presumption because it helps to prevent arbitrary and capricious agency action, ensures that questions of law are decided correctly, and forces agencies to articulate the rationale for their decisions, thus providing guidance for the parties subject to agency action. The NMB, without the benefit of judicial oversight for the last 50 years, has often fallen into the very patterns that judicial review is meant to curb.

This case provides a classic example. The NMB certified a transfer of union representation rights pursuant to a union-conducted merger election vote held six and one-half years before the Board's decision. The Board repeatedly admitted that the transfer of the certificate constituted a "representation dispute" covered by section 2, Ninth. Contrary to the explicit provisions of section 2, Ninth, however, it did not "designate who may participate in the election and establish the rules to govern the election"; neither did it "appoint a committee of three neutral persons" to perform these statutory requirements. 45 U.S.C. § 152, Ninth. Indeed, the NMB admittedly took no action at all to investigate or ascertain the "basic facts"[9] that must underlie any certification, namely, who are the employees and what is their choice. The NMB merely deferred to an outdated election conducted by the interested parties, thus allowing the fox to watch the hen-house.

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9 The Court in *Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 562 (1937), laid out the "basic facts" upon which a union certification rests under section 2, Ninth: "[T]he number of eligible voters, the number participating in the election and the choice of the majority of those who participate."

Instead of fulfilling its statutory duties, the Board asserted that it had not only "the unfettered discretion to determine *how* to ascertain employee preference" but also "the power to decide *whether* to ascertain employee wishes at all."[10] The NMB stated five times in its brief to the Court of Appeals[11] that the Board was entitled to "presume" that the union and its officers could speak for the bargaining unit on the issue whether it was their representative. This reasoning, which assigns to the interested unions the very issue that the Board is charged with independently investigating, clearly misinterprets the statutory scheme.[12]

This case is not an isolated instance of the NMB's cavalier attitude towards its statutory duty to ascertain the wishes of affected employees.[13] In *IAM v. Trans World*

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10 NMB Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss or for Summary Judgment at 11, *Continental Air Lines v. NMB*, No. 91-796 (D.D.C.) (Reply filed May 22, 1991).

11 Brief For The National Mediation Board at 18, 36 n.25, 37, 40, and 45, *Continental Air Lines v. NMB*, 957 F.2d 911 (D.C. Cir. 1992) (No. 91-5189).

12 The Board's error in relying on a union-conducted election to ensure the employees' choice is particularly apparent in the case of the Continental/Air Micronesia flight attendants. Only 33 of 59 received a ballot and the union kept no separate record whether any of them actually voted.

13 In *USAir v. NMB*, 711 F. Supp. 285, 293 (E.D. Va.), *aff'd mem.*, 894 F.2d 403 (4th Cir 1989), the court expressed concern that the NMB did not investigate allegations of union interference in an election, but felt constrained by *Switchmen's* to withhold judicial review. In *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989), the NMB refused to investigate whether individuals whose names were on a recall list, but who had not worked for more than a year after they went on strike, were still employees entitled to vote under the Act, or whether they had obtained employment elsewhere so as to be ineligible even by the NMB's own criteria. In *IAM v. Trans World*

(continued...)

*Airlines, Inc.*, 839 F.2d 809, 812 and n.1 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988), the NMB asserted that the RLA does not require it to be neutral on representation issues.[14] This position is illustrative of the attitude that can develop without judicial oversight.

The Board's action in this case not only disregarded the governing statute and the bedrock principle of employee free choice; it also reflected an abrupt about-face in NMB policy.[15] While the Board claimed its policy of non-

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13 (...continued)
*Airlines, Inc.*, 839 F.2d 809, 811 (D.C. Cir.), *cert. denied*, 488 U.S. 820 (1988), the NMB excluded from the election a block of employees temporarily working in another craft to help in a strike, in contravention of the Board's own rules. The court deemed the carrier's argument "appealing" but stated it was without power to grant relief under *Switchmen's*. Indeed, the NMB repeatedly states it is not bound to follow its own regulations or its published Representation Manual, and the courts nevertheless have considered that they are without jurisdiction per *Switchmen's*. *Air Canada v. NMB*, 478 F. Supp. 615 (S.D.N.Y. 1979), *aff'd mem.*, 659 F.2d 1057 (2d Cir.), *cert. denied*, 454 U.S. 965 (1981) (NMB's published rules on timeliness of authorization cards need not be strictly adhered to); *Hawaiian Airlines v. NMB*, 107 L.R.R.M. (BNA) 3322 (D. Hawaii 1979), *aff'd mem.*, 659 F.2d 1088 (9th Cir.), *opinion replaced*, 109 L.R.R.M. (BNA) 2936 (9th Cir. 1981), *cert. denied*, 456 U.S. 929 (1982) (NMB Representation Manual not binding on Board).

14 The NMB's position is stated in the Brief of Defendant-Appellee National Mediation Board at 22-24 and n.9, filed by the Department of Justice on December 4, 1987, in *IAM v. Trans World Airlines* (D.C. Cir. No. 87-5092).

15 Previously, in cases where one union affiliated or merged with another, the NMB consistently refused to certify the new union without itself investigating whether a majority of the employees actually chose the new union as their representative. For example, when members of the Air Transport Mechanics Union at Continental voted to affiliate with the IAM, the "Board refused to transfer the certification on the basis of a private election." *Continental Airlines, Inc.*, 8 N.M.B. Supp. A 709, 713 (1977). *Accord Pocono Airlines*, 9 N.M.B. 173 (1982); *Ross Aviation*, 9 N.M.B. 162 (1982); *Ozark Air Lines, Inc.*, 6 N.M.B. 473 (1978); *North Central*
(continued...)

investigation was its established practice, in fact it was a new approach adopted without any citation to prior practice or precedent or expression of any rationale for the change. Such unexplained changes in NMB policy are not infrequent, but generally have been found unreviewable.[16] *See generally* Herbert P. Northrup, *The Railway Labor Act--Time For Repeal?*, 13 Harv. J. L. & Pub. Pol'y 441, 482, 501 (1990)

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15 (...continued)
162 (1982); *Ozark Air Lines, Inc.*, 6 N.M.B. 473 (1978); *North Central Airlines*, 6 N.M.B. 612 (1978); *Texas International Airlines*, 5 N.M.B. 196 (1976); *see also Pennsylvania R.R.*, 2 N.M.B. 204 (1951).

16 The NMB has totally reversed itself on the showing of interest a union must make before obtaining an investigation of the status of related air carriers. *Compare Transamerica Airlines*, 12 N.M.B. 204 (1985), *with Eastern Air Lines/Continental Airlines*, 17 N.M.B. 432, 436 (1990). The NMB frequently has applied diametrically opposed policies on whether to impound ballots if a party files a challenge to some aspect of the election, and never has explained this divergence. *Compare Denver & R.G. W. R.R.*, 12 N.M.B. 303 (1985) (impounding ballots), *and Altair Airlines*, 7 N.M.B. 449 (1980) (same), *with USAir*, 8 N.M.B. 131 (1980) ("[i]n accordance with the Board's *normal procedure*, ballot in this election will be counted as scheduled. Following the count, the Board will determine what action is appropriate with respect to the issues raised in your protest" (emphasis added)), *and USAir*, 17 N.M.B. 377, 378 (1990) (request to delay ballot count called "extraordinary" ). The NMB has reversed itself several times on allowing "strawman" elections by individuals who sought to replace a certified union. *See generally* Thomas P. Murphy, *Deunionization in the Airline and Railroad Industries: The Need for Legislative Reform*, 35 Fed. B. News & J. 142, (March/April 1988) (criticizing NMB stance on decertification). *Compare Air France*, 6 N.M.B. 238, 6 N.M.B. 259 (1977) (individual wins election among dispatchers and immediately disclaims representation rights), *with Manufacturers Ry.*, 7 N.M.B. 451, 7 N.M.B. 485 (1980) (Board refuses to allow strawman decertification attempt), *and Chicago Union Station Co.*, 8 N.M.B. 141 (1980) (same), *and Atcheson, Topeka & Santa Fe Ry.*, 8 N.M.B. 66, 8 N.M.B. 81 (1980), 8 N.M.B. 469 (1981) (same). Following *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984), where the Fifth Circuit held employees had a right to become non-union, the Board refused to create a procedure for decertification, but began once again to allow strawman elections. *In re Chamber of Commerce*, 14 N.M.B. 347 (1987).

(criticizing NMB's inconsistency and failure to follow own rules; "[a] basic reason that the NMB can continue to operate with so many procedural shortcomings in the representation area is that the Supreme Court has severely restricted judicial review. . . . [i]n *Switchmen's* . . . .")

Judicial review would greatly improve representation proceedings under the RLA, for "[t]he special competence of the National Mediation Board lies in the field of labor relations rather than in that of statutory construction." *Switchmen's*, 320 U.S. at 321 (Reed, J., dissenting). Judicial review would not only protect the bedrock principle of employee freedom of choice, it would also lead to better informed and articulated NMB decisions, which in turn would provide guidance to the parties subject to NMB authority. It would control arbitrary and capricious NMB action, a curb sorely needed after 50 years without judicial oversight.

## CONCLUSION

The petition for a writ of certiorari should be granted, to assess the continued viability and application of *Switchmen's Union*, and to insure integrity in the administration of the Railway Labor Act.

Respectfully submitted

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July 15, 1992

Supreme Court, U.S.
FILED
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No. 91-2009

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1991

CONTINENTAL/AIR MICRONESIA AND CONTINENTAL AIRLINES, INC., *Petitioners,*

v.

NATIONAL MEDIATION BOARD, *Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

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No. 91-2009

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Continental/Air Micronesia and Continental Airlines, Inc.,

Petitioners,

v.

National Mediation Board,

Respondent.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

After the filing of the Petition in this case, the Court of Appeals for the Ninth Circuit rendered a decision which conflicts with the decision below of the Court of Appeals for the District of Columbia. In *America West Airlines, Inc. v. National Mediation Board*, No. 90-16337, 1992 U.S. App. LEXIS 15216 (9th Cir. July 7, 1992), the Ninth Circuit enjoined a National Mediation Board ("NMB") action which

"exceeded [the Board's] statutory authority" to investigate disputes under Sections 2, Fourth and 2, Ninth of the Railway Labor Act, the same provisions at issue in this case. If the Ninth Circuit had followed the standards for review of NMB decisions established by the Court of Appeals for the District of Columbia, judicial review of the Board's action would not have been available.[1/]

In *America West Airlines*, the Ninth Circuit required no "gross violation" of the Railway Labor Act as a predicate for judicial review of the Board's actions.[2/] Instead, adhering to normal precepts of judicial review, Judge Tang straightforwardly said that "when the Board acts in excess of its statutory authority, judicial review may be available." Further rejecting the "gross violation" standard, *America West* noted that "it is unnecessary to show both that the Board acted in excess of its authority and that it acted contrary to a specific statutory provision, to obtain judicial review." Finally, the Ninth Circuit limited the reach of this Court's

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1/ As noted in the Petition, at 5-6, the panel below, exercising "one of the narrowest (judicial reviews) known to the law" found no "gross violation" of the RLA. The "gross violation" standard is well-established in the Circuit Court for the District of Columbia. *See Teamsters v. Bhd. of Ry. Clerks*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968) (not gross violation for NMB to compel union to appear on ballot); *International Ass'n of Machinists v. Trans World Airlines*, 839 F.2d 809, 811 (D.C. Cir.), *cert. denied* 488 U.S. 820 (1988) (not gross violation for NMB not to remain neutral); *Prof. Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 463 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989) (not a gross violation for NMB to count unreinstated strikers as eligible voters).

2/ Indeed, it would be hard to imagine the NMB's actions in *America West* being a "gross violation" of the RLA. The Board proposed to send out a notice in conjunction with rerunning an election which reflected the Board's view that the company had interfered with the initial election. Such action, which would have been standard procedure for the NLRB under the National Labor Relations Act, but which fell outside the scope of the NMB's statutory powers, was never criticized by the Ninth Circuit as being outrageous from a policy perspective.

decisions in *Switchmen's Union* and its progeny in precisely the same way that the Petition suggests they should be limited: because "the present case does not involve a jurisdictional dispute between two unions" and the Board acted outside its statutory authority, review was appropriate.[3/]

In short, the Ninth Circuit's decision creates a split in the circuits over the standards for judicial review of Board actions. The Petition seeks review of Board actions which contravene both the express language and the fundamental majority-rule principle of the Railway Labor Act. Petition at 14-16. The Ninth Circuit reviewed a Board action based upon its conclusion that the legislative history of the Railway Labor Act showed the Board had overreached its statutory mandate. Moreover, the court in *America West* reached its conclusion even though, unlike here, the Board's action did not involve a clear flouting of statutory language and the policy behind the statute as a whole. Based on the reasoning of *America West*, the present case *a fortiori* should be subject to judicial review.

*America West Airlines* thus reaffirms the need for this Court to examine the decision of the court below, which precluded judicial review of the Board's transfer of two union certifications without assessing employee wishes, contrary to the majority-rule principle and the specific statutory provisions of the Railway Labor Act.

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3/ *Compare* Petition at 6-8, 14 (*Switchmen's Union* and progeny should not be interpreted to preclude judicial review when NMB ignores language and policy of RLA) *with America West, infra*, at 10A (*Switchmen's Union* involves Board "finding of fact" in jurisdictional dispute between unions, not Board acting "in excess of statutory authority"). In *America West*, the Board violated its obligation to investigate by stepping into an adjudicatory mode, while in this case, the Board established a rule which made its statutorily-mandated investigation of employee wishes unnecessary.

## CONCLUSION

In addition to the reasons stated in Petitioners' original brief, the writ should be granted in order to reconcile the split in the circuits on the proper scope of judicial review of the NMB's decisions, and to ensure that NMB decisions are grounded in the premise that employees will be represented by unions of their own choosing.

Respectfully submitted,

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July 23, 1992

# APPENDIX

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

1992 U.S. App. LEXIS 15216

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October 11, 1991, Argued and Submitted, San Francisco, California
July 7, 1992, Filed

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No. 90-16337

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America West Airlines, Inc.;
Edward R. Beauvais; Michael J. Conway,

Plaintiffs-Appellees,

v.

National Mediation Board,

Defendant-Appellant.

---

PRIOR HISTORY: Appeal from the United States District Court for the District of Arizona. D.C. No. CV-90-00925-EHC. Earl H. Carroll, District Judge, Presiding.

COUNSEL:
John S. Koppel, United States Department of Justice, Washington, D.C., for the defendant-appellant.

Robert A. Siegel, O'Melveny and Myers, Los Angeles, California for the plaintiffs-appellees.

JUDGES: Before: Thomas Tang, and Stephen S. Trott, Circuit Judges, and Rudi M. Brewster, *District Judge.

*Honorable Rudi M. Brewster, United States District Court Judge for the Southern District of California, sitting by designation.

Opinion by Judge Tang.

OPINION BY: Tang

TANG, Circuit Judge:

The National Mediation Board ("Board") appeals the decision of the district court reported at 743 F. Supp. 693 (D. Ariz. 1990) granting the motion of America West Airlines, Inc., ("America West" or "Carrier") for a preliminary injunction. The district court enjoined the Board from mailing a notice to America West employees indicating America West violated provisions of the Railway Labor Act, as amended, 45 U.S.C. §§ 151-188. The notice was to be sent in conjunction with a rerun representation election which the Board found necessary in light of America West's conduct prior to the original election. Because distribution of the proposed notice would be in excess of the Board's statutory authority, we affirm the ruling of the district court.

## FACTS AND PROCEDURAL BACKGROUND

This case arose when the Association of Flight Attendants ("AFA") filed an application with the Board pursuant to the Railway Labor Act, 45 U.S.C. § 152, Ninth, alleging a representation dispute among a "craft or class" of America West employees which the Board eventually defined as "Flight Attendants." *See In re Association of Flight Attendants*, 17 N.M.B. 79, 79-80 (1990).[1/]

In carrying out its investigation of the dispute at America West, the Board ordered a secret ballot election, *see* 17 N.M.B. at 80, as authorized by statute:

> In such an investigation, the Mediation Board shall be authorized to take secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier.

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1/ For a description of the Railway Labor Act, and the Board's role thereunder, *see generally Herbert R. Northrup, The Railway Labor Act – Time for Repeal?*, 13 Harv. J.L. & Pub. Pol'y 441 (1990). While the Board might be equated to the National Labor Relations Board in a few respects, the parallel is quite limited. *See id.* at 445. Professor Northrup makes the following generalizations: "Unlike the NLRB, . . . the NMB has no statutory authority to adjudicate unfair labor practices, it has no procedure for formal hearings before administrative law judges, and it is not subject to judicial review." *Id.* at 500. Consequently, in proscribing unfair labor practices by air and rail carriers, "the court system is utilized as a substitute for an administrative agency such as the NLRB because the NMB has no authority to handle unfair labor practices (although it certainly attempts to restrict employer action in representation cases)." *Id.* at 505-06.

45 U.S.C. § 152, Ninth (excerpt).[2/]

Following this first election, the AFA filed with the Board a "Motion for Board Determination of Carrier Interference." 17 N.M.B. at 80. In response, the Board concluded that "the carrier has improperly interfered with, influenced, and coerced its flight attendants in their freedom of choice, by the 'totality' of its conduct." *Id.* at 98. In reaching this conclusion, the Board cited "the timing of benefits, the presence of [America West Chairman and Chief Executive Officer] Beauvais and [America West President and Chief Operating Officer] Conway at [a] profit-sharing party, as well as the timing of the party, [and] the letters from Beauvais and Conway with their criticism of AFA." *Id.* at 102; *see also Northrup*, supra note 1, at 499-500 (discussing Board's decision).

In arriving at this conclusion, the Board apparently considered the AFA's motion, America West's written reply, and various affidavits, declarations, and exhibits accompanying the parties' arguments. *See* 17 N.M.B. at 80. The AFA also filed a request for a particular kind of ballot to be used in a second election, and the Carrier filed a "position statement" opposing the request. *See id.* Despite America West's persistence in requesting a hearing on the allegation of election interference, *see America West Airlines,* 17 N.M.B. 226, 228 (1990), no hearing was held nor was America West's request ever discussed by the Board in its published decisions.

Having concluded that America West interfered with the first election, the Board ordered a rerun election. 17 N.M.B. at 102. The Board further ordered that "a special 'Notice to all Employees' . . . be distributed along with the

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2/ The Board's decision ordering the first election is reported at 16 N.M.B. 135 (1989).

ballot materials to each eligible voter in these elections." *Id.* The notice states in pertinent part:

> NOTICE TO ALL EMPLOYEES
>
> PURSUANT TO FINDINGS UPON INVESTIGATION AND ORDER OF THE NATIONAL MEDIATION BOARD AND IN ORDER TO EFFECTUATE THE POLICIES OF THE RAILWAY LABOR ACT, AS AMENDED, ALL EMPLOYEES ARE HEREBY NOTIFIED THAT:
>
> After an investigation conducted by the National Mediation Board in which the Carrier and the Union had the opportunity to present statements and evidence, the National Mediation Board found that the Carrier's conduct, taken as a whole, improperly interfered with employees' choice of representative under Section 2, Ninth, of the Act. It is unlawful for a carrier to interfere with the organization of its employees.
>
> Section 2, Fourth of the Act, 45 U.S.C. § 152, allows employees the right to select representatives without carrier influence or interference. . . .
>
> . . . .
>
> All employees are free to express their desire to be represented by a labor organization or remain unrepresented. The Carrier is not permitted to influence, interfere or coerce employees in any

> manner in an effort to induce them to participate or refrain from participating in the upcoming elections.

17 N.M.B. at 104-05. After the Board rejected America West's motion for reconsideration, *see* 17 N.M.B. at 234-35, the Carrier and two of its officers filed this action seeking to enjoin the Board's use of the notice.[3/]

In the district court, America West argued that, while the proposed rerun election in itself was a permissible investigatory tool, the notice as proposed would be in excess of the Board's investigative authority. The Carrier emphasized that the Board was attempting to usurp remedial powers similar to those with which the National Labor Relations Board is endowed. America West also raised arguments under the First and Fifth Amendments. 739 F. Supp. at 695.

In response, the Board argued that its notice was permissible means of conducting the investigation authorized under section 152, Ninth, particularly in light of the statute's mandate that the Board "shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier" (emphasis added). The Board also emphasized the extremely narrow scope of judicial review to which the Board is subject.

The district court granted the motion for a preliminary injunction in an unpublished order accompanied by a published opinion. In barring distribution of the Board's notice, the district court reasoned:

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3/ America West does not seek to enjoin the rerun election itself, or other aspects of the Board's investigation of the representation dispute.

The problem here with the form of the Notice is that it overstates, if not directly, by clear inference, that the Board has conducted an adversarial investigation ("The opportunity to present statements and evidence") and found through that process that the carrier had "unlawfully" interfered with the organization of its employees. The Board did neither of those things; it has no jurisdiction to make either an adjudicative decision or to find that a carrier acted unlawfully when it did the things that caused the Board to order a re-run election.

. . . .

The Board has every right to conduct an investigation, in the manner it chooses, and to find whether or not an election or re-election is required. That terminates the investigative process. A notice that it has conducted an investigation and has ordered a re-run election, due to activities of the carrier that could have interfered with the employees' choice of representation, is consistent with its § 2, Ninth jurisdiction. [Emphasis added.] It is only when the Board chooses to mischaracterize the nature of its investigation as an adjudicative proceeding or to cast the carrier's activities as unlawful, that intervention of a court is justified; it is then that Board actions can be characterized as a constitutional violation or a gross violation of the RLA.

743 F. Supp. at 699 (footnote and citation omitted).[4/]

The Board timely appeals from the district court's order; proceedings in the lower court have been stayed pending the outcome of this appeal.

## DISCUSSION

### I. Jurisdiction

The Board frames its appeal primarily as a challenge to the subject matter jurisdiction of the district court. The leading case holding that the federal courts lack power to review Board decisions in representation matters is *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943).

In Switchmen's, the Supreme Court was presented with a challenge to the Board's certification of a particular union. *Id.* at 299. A rival union charged that the Board's determination of the appropriate "craft or class" was

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4/ The Board has consistently rejected America West's requests to modify the language of the notice. *See* 17 N.M.B. at 234 & n.4. Regarding these proposed revisions to the notice, counsel for America West stated at oral argument before the district court that "in terms of the form of the notice, I think America West would, on balance, accept the Court's comments earlier on . . . . So that [the notice] would say, 'The Board has found that the carrier's conduct, arguably, improperly interfered," and that this whole text would be included in one notice. I think that [would go] a long way to mollifying our constitutional concerns, Your Honor.'" The Board refused to agree to this modification even though the district court's order indicates that such a modification would permit distribution of the notice. In a very similar case, however, the Board did modify its proposed notice in response to objections raised by the carrier. *See Key Airlines, Inc. v. National Mediation Bd.*, 745 F. Supp. 749, 750-51 (D.D.C. 1990). The modifications, which indicated that the carrier disagreed with the Board's conclusions, rendered the carrier's challenge to the notice to be "wholly without merit." *Id.* at 752.

improper. *Id.* The Court concluded that the federal courts "did not have the power to review the action of the National Mediation Board in issuing the certificate." *Id.* at 300. In so concluding, the Court reasoned that Congress had afforded protection of the statutory right to collective bargaining by creating the Board; in the absence of evidence of a contrary intent, Congress's decision not to provide for judicial review of Board decisions is controlling. *Id.* at 300-06. As a result, "judicial review of [Board] decisions is extraordinarily limited." *Professional Cabin Crew Ass'n v. National Mediation Bd.*, 872 F.2d 456, 459 (D.C. Cir.), *cert. denied*, 493 U.S. 974 (1989).

In arriving at its decision, the *Switchmen's* Court emphasized that "the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied." 320 U.S. at 301; *see also id.* at 302 ("the history of § 2, Ninth is highly relevant"). In reviewing the statute in question here, and the Board's power thereunder, the Court observed:

> The Mediation Board makes no "order." And its only ultimate finding of fact is the certificate. The function of the Board under § 2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforceable by judicial decree. But the "command" is that "of the statute, not of the Board."
>
> . . . .
>
> . . . Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find

> the fact and then cease. Congress prescribed the command. . . The intent seems plain -- the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals.

*Id.* at 304-304 (citation omitted). Thus, so long as the Board is acting with the purpose of "finding the fact" as to who is the employees' representative, the courts are deprived of jurisdiction to review Board decisions. *See also Air Line Pilots Ass'n, Int'l v. Transamerica Airlines, Inc.*, 817 F.2d 510, 515 n.3 (9th Cir.), *cert. denied*, 484 U.S. 963 (1987).

On the other hand, when the Board acts in excess of its statutory authority, judicial review may be available. *E.g., Hunter v. National Mediation Bd.*, 754 F.2d 1496, 1498 (9th Cir. 1985).[5/] As the Board concedes, it has no authority to adjudicate unfair labor practices. America West argues accordingly that the proposed notice amounts to an unauthorized remedy for an unfair labor practice. We are not persuaded. Of particular importance here is the fact that the Board itself intends to distribute the notice with the ballot for

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5/ Contrary to the Board's argument, we believe it is unnecessary to show both that the Board acted in excess of its authority and that it acted contrary to a specific statutory provision, to obtain judicial review. It is true, however, that something more than an act in excess of authority is necessary before judicial review is available. *See Board of Governors v. MCorp. Fin.*, 112 S. Ct. 459, 465-66 (1991). In the present case, we think the potential for irreparable harm to the reputation among employees of America West and its officers posed by distribution of the Board's notice justifies our exercise of jurisdiction at this stage of Board proceedings. *Cf. id.* at 466 (availability of "meaningful and adequate opportunity for judicial review" upon completion of administrative proceedings precludes federal judicial intervention during course of proceedings).

the rerun election. By contrast, when the NLRB intends that a notice be posted or sent to employees to remedy an unfair labor practice, it orders the employer to publish the notice. *See Empl. Coordinator (Research Inst. Am.)* 128,004 (Feb. 20, 1989) (citing *NLRB v. Express Pub. Co.*, 312 U.S. 426, 438 (1941)); Kenneth C. McGuiness & Jeffery A. Norris, *How to Take a Case Before the NLRB* 409 (5th ed. 1986) ("McGuiness & Norris).[6/] Consequently, the Board's characterization of the proposed notice as an investigatory tool, rather than a remedy for an unfair labor practice, is correct. However, the Board errs in its assumption that its discretion in choosing the means by which to conduct a representation investigation is completely unfettered.

The Board contends that notice is, like the rerun election itself, an investigatory tool necessary to "insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier," 45 U.S.C. § 152, Ninth. As such, the Board contends its proposed notice is identical in nature to the various types of ballots used by the Board, which America West concedes are unreviewable. Thus, the Board argues that its decision to employ the notice is not reviewable as being in excess of statutory authority.

The history of the Railway Labor Act belies the Board's argument. In *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570 (1971), the Supreme Court was faced with the question whether federal courts, as opposed to the Board, should hear cases in which one party subject to the

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6/ Federal courts have refused to enforce NLRB remedial orders in which employers are made to admit past unfair labor practices. *See Express Publ Co.*, 312 U.S. at 438-39 (citing cases). Thus, the notice proposed by the Board in this case probably would not pass muster as an unfair labor practice remedy. *Cf. McGuiness & Norris* 411-17 (reproducing form notices used by NLRB); *id.* § 17.14 (discussing NLRB notices).

Railway Labor Act accuses another of violating 45 U.S.C. § 152, First. 402 U.S. at 572. This part of the Act imposes a duty to "make and maintain" collective bargaining agreements. *See id.* at 571. The Court's resolution of this issue is most instructive to the present case:

> Finally, we must consider the Court of Appeals' position that the question whether a party had exerted every reasonable effort was committed by the Railway Labor Act to the National Mediation Board rather than to the courts. We believe that the legislative history of the Railway Labor Act rather plainly disproves this contention. It is commonplace that the 1926 Railway Labor Act was enacted because of dissatisfaction with the 1920 Transportation Act, and particularly with the performance of the Railroad Labor Board. While there were many causes of this dissatisfaction, one of the most prominent was that because of its adjudicatory functions, the Board effectively lost any influence in attempting to settle disputes. Throughout the hearings on the bill which became the 1926 Act there are repeated expressions of concern that the National Mediation Board should retain no adjudicatory function, so that it might maintain the confidence of both parties.

402 U.S. at 579-80 (footnote omitted) (emphasis added); *accord Regional Airline Pilots Ass'n v. Wings W. Airlines, Inc.*, 915 F.2d 1399, 1402 (9th Cir. 1990) ("Congress took special precautions . . . so as not to jeopardize the Board's primary function as a neutral in the mediation process"), *cert. denied*, 111 S. Ct. 2891 (1991); *see Ruby v. American*

*Airlines, Inc.*, 323 F.2d 248, 256 (2d Cir. 1963) (Friendly, J.) ("For the courts to require the Mediation Board to transform itself into an adjudicative and prosecutorial agency like the N.L.R.B. . . . would distort the entire Congressional scheme."), *cert. denied*, 376 U.S. 913 (1964); *see also Switchmen's*, 320 U.S. at 302-03 (providing additional legislative history concerning 1934 amendments to Railway Labor Act).[7/]

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7/ In *Chicago & North Western*, a 1971 case, the Supreme Court saw fit to rely on legislative history dating from 1926, even though the nature of the National Mediation Board changed when the Railway Labor Act was amended in 1934. *See Northrup*, supra note 1, at 445-46. The change included the addition of 45 U.S.C. § 152, Ninth, *see id.* at 478-79, the provision which lies at the heart of the present case. Despite this development, we believe the purely investigatory nature of the Board did not change with the 1934 amendment -- at least insofar as the present case is concerned.

Although language to the contrary appears in a companion case to *Switchmen's, General Comm. v. Missouri-Kan.-Tex R. Co.*, 320 U.S. 323, 330, 332 (1943) ("MKT Railroad) (indicating that after 1934 the Board has performed an adjudicatory function in investigating representation disputes), and in *Aircraft Mechanics Fraternal Ass'n v. United Airlines*, 406 F. Supp. 492, 498, 501, 503 n.11, 506 (N.D. Cal. 1976) (same), these cases involve jurisdictional disputes concerning which of two unions represent a "craft or class." *See MKT Railroad*, 320 U.S. at 325-27; *Aircraft Mechanics*, 406 F. Supp. at 494-95. Assigning the Board an adjudicatory role in such disputes does not risk compromising the Board's neutrality when it comes to resolving a dispute between a union and an employer. Indeed, the *Chicago & North Western* Court recognized that resolution of jurisdictional disputes between two unions may represent an exception to the Board's otherwise purely investigatory powers. 402 U.S. at 580-81; *see also Regional Airline Pilots*, 915 F.2d at 1402. Because the present case does not involve a jurisdictional dispute between two unions, it remains proper to describe the Board's powers here as purely investigatory.

It should also be noted that the *Aircraft Mechanics* court, at least, may have referred to the a Board's function as "adjudicatory" (continued...)

In light of the legislative history recounted in *Chicago & North Western*, we conclude that the federal courts have jurisdiction to determine when the Board has mistakenly stepped out of the investigator's inverness into the robe of the adjudicator. If the Board has done so, it has exceeded its statutory authority -- regardless of whether its action also happens to be employed as an investigatory tool. *See also Brotherhood of Ry. & S.S. Clerks v. National Mediation Bd.*, 374 F.2d 269, 273 (D.C. Cir. 1966) ("in a case of a demonstrably false and misleading statement in the Board's announcement [to carrier employees] of the new election, the courts are not without jurisdiction").

## II. Preliminary Injunction

### A. Standard of Review

The decision whether to issue a preliminary injunction rests within the discretion of the district court; its decision "will be reversed only if the district court relied on an erroneous legal premise or abused its discretion." *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). Where the district court is alleged to have relied on erroneous legal premises, review is plenary. *See id.*

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7/(...continued)
because of the court's perception that "since the Board must insure a coercion-free election atmosphere, it usually makes a finding concerning illegal influence, which finding is binding on the courts." 406 F. Supp. at 503 n.11. That is to say, any finding is, in a sense, an adjudication; the district court in *Aircraft Mechanics* had no cause to think otherwise. In the present case, however, America West seeks to distinguished between types of "finding" of illegal influence, for example, for purposes of determining the next step in its investigation of a representation dispute. In fact, America West would go so far as to allow the Board to issue its finding to Carrier employees, so long as the contested status of the finding appears. What America West challenges is the Board's ability to represent its finding to Carrier employees as a final adjudication of the alleged unfair labor practices.

("unless the district court's decisions relies on erroneous legal premises, it will not be reversed simply because the appellate court would have arrived at a different result").

However, in its application of law to the facts, the decision of the district court regarding a preliminary injunction will only be reviewed for an abuse of discretion. *Id.* Findings of fact will be reviewed for clear error. *See id.*

B. Merits

In deciding to enjoin pendente lite the distribution of the Board's notice to America West employees, the district court applied the standard set forth in *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1174 (9th Cir. 1989). *See* 743 F. Supp. at 697. The *Johnson* standard is as follows:

> The party requesting the preliminary injunction[ ] [must] show either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in it favor. This test is viewed as a continuum.

886 F.2d at 1174 (citation omitted). The district court focused on that portion of the test concerned with whether American West had demonstrated a likelihood of success or, at least, had shown serious questions regard the merits. *See, e.g.*, 743 F. Supp. at 697 ("This Court has serious concerns that the publication of the special notice . . . exceeds the power and authority of the Board."). The parties do not dispute this approach; it therefore may be assumed that the balance of hardships tips sufficiently in favor of America West's request for a preliminary injunction. The predominant question then is whether the district court abused its discretion

concluding that serious questions had been raised as to the merits of America West's motion.

In stating that Board "found that the Carrier's conduct, taken as a whole, improperly interfered with employees' choice of representative," the proposed notice makes no allowance for the fact that the Board lacks jurisdiction to adjudicate what would otherwise be an unfair labor practice. Indeed, from the use of the word "remedy" or "remedial" throughout the Board's decisions, *see* 17 N.M.B. at 80, 95, 96, 102; 17 N.M.B. at 277, 229, 233, 235, 242, it appears that the Board is addressing an unfair labor practice, rather than simply deciding how best to investigate a representation dispute and determine the employees' representative.

We conclude the district court did not abuse its discretion in enjoining pendente lite the Board's notice as an action beyond the scope of statutory authority.[8/]

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8/ We need not reach America West's alternative contentions that the Carrier was denied due process, or that the notice infringes upon the First Amendment rights of the Carrier and its management.